

Civil Dispute Processing in China During Reform

ROGER RICHMAN*

I. INTRODUCTION

Two years after Mao Zedong's death in 1976 a new leadership began steering China away from Mao's revolutionary communism toward a "second revolution" in economic reform, and toward reestablishing the mediation and legal institutions destroyed during the preceding years.¹ The Reform movement, as it became known in the West, was a significant experiment in economic and legal change: it moved the largest society toward a combined socialist and market economy and a mixed socialist and western style legal system.²

The declaration of martial law, the massacre of demonstrators in Tiananmen Square in early June 1989,³ the persecution and show trials of dissidents, and the close monitoring of civilian movement in Beijing,⁴ evidence that the Chinese leadership was unprepared to accept the political implications of the Reform movement. While the events at Tiananmen Square startled foreign governments as well as business and academic supporters of the Reform movement, other analysts noted a broader context for the crackdown; economic problems had previously caused a reassertion of centralized Communist Party decision making, a general tightening of central authority, and a call for discipline in Chinese politics and economic life.⁵

In the dozen Reform years prior to Tiananmen Square, 1977-89, mediation was relatively depoliticized as compared to its past use and was subjected to legislative procedural rules and administrative oversight. Today, mediation is widely practiced in China by hundreds of thousands of People's Mediation Committees as part of a domestic social welfare

* Professor of Public Administration at Old Dominion University, Norfolk, Virginia. He received his Ph.D. in Public Administration from the New York University.

1. The term "second revolution" is from Deng Xiaoping, China's leader since 1978. In 1991, Deng is China's aging head of state and Li Peng is Premier.

2. HARRY HARDING, *CHINA'S SECOND REVOLUTION: REFORM AFTER MAO* (1987); Walter Gellhorn, *China's Quest for Legal Modernity*, 1 J. OF CHINESE L. 1 (1987).

3. HARRISON E. SALISBURY, *TIANANMEN DIARY: THIRTEEN DAYS IN JUNE* (1989).

4. See, e.g., *id.* (eye witness descriptions of the attacks on students and workers in June 1989); See generally *CHINA DAILY*, June-July 1989, March-April 1990 (quasi-official Chinese accounts and descriptions of arrests and trials).

5. Al Kamen, *CIA: China's Stability Threatened*, WASHINGTON POST, June 29, 1990, at A31.

process. These Committees operate under rules established by the Justice Ministries of local governments. Mediation is also a routine part of the judicial process, called "in-court mediation," and is also part of an expanding Chinese arbitration practice. It is, in fact, embedded in all the formal Chinese dispute settlement systems: the judicial, administrative, and arbitration processes.

This article explores the Chinese practice of civil dispute resolution. Particularly, it will focus on the role of mediation as an alternative dispute settlement practice and the recent development of Chinese legal institutions. The paper begins with a description of the effects of the post-Mao reforms on China's public mediation systems. After reviewing the history of the communist's strategic use of mediation from the Communist Party's formative years to the Cultural Revolution, this paper describes the effects that China's Reform movement over the past dozen years had on the legal system and on mediation practices. Three dispute resolution practices are reviewed: the People's Mediation Committee system, the In-Court Mediation system of the People's Courts, and the use of mediation and arbitration to resolve commercial disputes in the People's Republic.

II. THE POST-MAO REFORM MOVEMENT

The Chinese government, led by Deng Xiaoping, declared martial law in Beijing in 1989 and fiercely suppressed political dialogue. Not inconsistently, that same leadership had previously been regarded as the sponsor and architect of the Reform movement that led China from a stagnant communism into an era of economic development and of rapprochement with the West. Deng had been popularly regarded as China's economic liberator since 1978 when his group took control of the government and began the rationalization of Chinese economic and social life as a post-Mao Reform movement. The concentration on economic liberalization and reform did not, however, as events showed, presage immediate acceptance of political diversity and tolerance of dissonance. Since 1978, economic reform has been encouraged, while political reform has been suppressed.⁶ The Chinese economic reform has been evidenced by both introduction of a market oriented "enterprise" system for new industrial and commercial development as well as a "responsibility system" that encourages private entrepreneurship in rural collective

6. HARDING, *supra* note 2, at 99, 174.

farming.⁷ The opening of China to western investors has also made economic reforms within China more visible.⁸

The connections between economic reform policies and reform of the legal system are evident. Contract, property, and economic relations laws were, by the late 1970's, understood to be essential to the creation of any version of a market economy. But, the country's legal institutions had been particular targets during Mao Zedong's Great Proletarian Cultural Revolution 1965-76. By the end of the Cultural Revolution, the legal profession had virtually disappeared in China: courts were not functioning, and those judges who had not been purged (jailed or sent to work as field laborers) were low-level Party cadres who decided cases on ideological principles. The People's Mediation System functioned as an instrument of political control at the "grassroots" level, in residential blocks or factory work groups.⁹ A functioning governmental dispute resolution and legal system did not exist in China in 1975.

In reaction to the destruction of the institutions of this period, Deng's Reform in the late 1970's and throughout the 1980's sought to establish a functioning legal system to rationalize society and thus provide a base for expanded international trade and internal economic development. During the 1980's, a revised national constitution, making significant reference to the rule of law and to individual procedural rights, was adopted,¹⁰ as was a code of civil procedure,¹¹ and dozens of laws establishing or regulating economic rights and transactions. Furthermore, considerable emphasis was placed on the rehabilitation of the courts, creation of new court systems, and on the reconstruction of the legal profession, including law schools, which had been abandoned during the Cultural Revolution.

7. Phyllis L. Chang, *Deciding Disputes: Factors that Chinese Courts in the Adjudication of Rural Responsibility Contract Disputes*, 52 LAW & CONTEMP. PROBS. 101, Summer (1989).

8. SHAO-CHUAN LENG & HUNGDAH CHIU, CRIMINAL JUSTICE IN POST-MAO CHINA: ANALYSIS AND DOCUMENTS (1985).

9. See *infra* notes 28-35 and accompanying text for a discussion of the People's Mediation Committee system.

10. THE CONST. OF THE P.R.C., translated in, I Statutes and Regulations of the People's Republic of China (University of East Asia Press and Institute of Chinese Law (Publishers) Ltd.) No. 821204 (1983).

11. CIVIL PROCEDURE LAW PROVISIONAL, translated in, I Statutes and Regulations of the People's Republic of China (University of East Asia Press and Institute of Chinese Law (Publishers) Ltd.) No. 820308 (1982) [hereinafter CIVIL PROCEDURE LAW].

III. COMMUNIST MEDIATION 1927-76

From the beginnings of the Communist Revolution to the end of the Cultural Revolution, the Chinese communists' used mediation as an instrument of state policy. This section briefly reviews the politicized use of the legal and mediation systems in China that were prevalent, with brief exceptions, prior to the post-Mao Reform period. While the most ideologically oriented uses of mediation were discarded during the 1980's, the social and political roles of the current mediation systems were created in the revolutionary period and during the first decades of communist rule.

A. Mediation Committees and Political Organization

A primary concern of researchers of communist mediation practice must be the degree to which mediation was, or is, used to promote state or party interests in conflict with the interests of disputants. During the long Communist Revolution, 1927-49, mediation practice evolved as one element of a strategy to organize rural communities into closely knit social and political units. The People's Mediation Committees evolved from several revolutionary communist objectives: these objectives included creating a socialist dispute settlement system (a proletarian justice system replacing a judicial bureaucracy of elites), developing a political system of "mass organizations" to disseminate the highly centralized communist ideology, and extending Mao's command and control structure across a vast rural populace.¹² The "mass organizations" were officially described as nongovernmental political committees; but in fact, they were utilized as a government tool by the Communist Party - a network of committees set up to extend political organization and its attendant rewards, sanctions, and controls to the smallest feasible group level. The program was, and to a considerable extent still is, run by Party cadres although the many changes in China in the 1980's have reoriented the radical communist messages of the early mass organizations.

The mass organizations originated in the National People's Congress, the governing body. Today, at each level of government, they extend in a hierarchical series of political committees down to the street level. These mass organizations constitute a vast social-political structure transmitting Party policy to the populace ultimately at the level of small

12. Stanley Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 CALIF. L. REV. 1284 (1967).

CIVIL DISPUTE PROCESSING IN CHINA

groups. Each municipality, village, commune, and factory is organized into committees and has subunits that report upward. In urban areas the structure grows from the level of the Street Committee to the Neighborhood Committee (representing approximately two thousand people), to the district level, and to the municipality.¹³ These "mass organizations," elected by local residents with leadership by Party cadres, were originally designed to transmit Party ideology and policy to the people. They have, however, added practical social functions. At the street level, the Street and Neighborhood Committees collect refuse and rents, maintain the street, and perform social welfare functions that include allocating housing, undertaking instruction in the content of domestic law, and performing civil dispute mediation.¹⁴

Thus, the People's Mediation Committees, offshoots of the general Neighborhood Committees, are also units of the "mass organizations." In the People's Mediation System, each urban neighborhood, rural village, and labor unit in a commune has a formally organized mediation committee with the avowed purpose of assisting disputants in settling their conflicts. Their idealized social function, as characterized by a friendly observer in the late 1960's, was to offer a communally based dispute settlement service, to be an integrative unit in the community, to be a welfare service, and to provide an important medium of contact between alienated or deviant individuals and the community.¹⁵ If individuals showed signs of deviant behavior, third party help was immediately provided. According to Victor Li,¹⁶ the mediation committees' unique "welfare" function was providing a support network for troubled individuals by heading off social conflict through early interventions. The intimacy of social intervention by mediators of this model supposedly provided a support network for individuals. Early intervention in child deviant behavior cases, in marital conflict cases, or in in-law conflict cases, or in neighbor dispute cases, purportedly led to a highly successful social resolution of these cases. Thus, early intervention, which was called "on the spot" mediation because it took place before the conflict had time to ripen and get worse, heads off unnecessary conflicts and maintains social stability.¹⁷

13. Cheng Gang, *The Neighborhood Committee - Residents' Own Organization*, BEIJING REV., April 9-15, 1990 at 26.

14. *Id.* at 27.

15. VICTOR H. LI, *The Evolution and Development of the Chinese Legal System*, in CHINA MANAGEMENT OF A REVOLUTIONARY SOCIETY 221-55 (John M.H. Lindbeck ed., 1971).

16. *See supra* note 15.

17. VICTOR H. LI, *LAW WITHOUT LAWYERS* (1978).

B. Ideology and Control

Stanley Lubman has argued persuasively that mediation in Communist China developed as a means of implementing the Party's substantive policies and objectives of organizing, directing, and controlling the population through instruments of "mass organization."¹⁸ He asserted that the essential characteristic of the mediation committees and the entire mediation process was primarily to accomplish state aims and not to serve disputants' interests.

While mediation was aimed at resolving disputes, maintaining public order, and ending "bad feelings" among disputants, Lubman identified three other functions of mediation: "it [mediation] serves to articulate the ideological principles, values, and programs of the Chinese Communist Party . . . it serves to suppress rather than settle [certain] disputes between individuals . . . it supplements [as a behavior monitoring and reporting device] other means of control [police, cadres with power to sanction] exercised by the state and Party apparatus."¹⁹ For example, communist practice discouraged and officially denigrated negotiation and bargaining as "unprincipled" mediation. The Party sanctioned only "principled" mediation, meaning mediation following ideologically "correct" policy. An example of the use of mediation to further state interests was the use of the mediation committees in the mid-1950's to settle disputes among peasants over allocation of water, timber, and tools following land redistribution and collectivization. This use furthered the Party's interests in rapid collectivization and in the use of mediation committees "persuading doubters of the advantages of cooperativization . . . [m]ediation committees were used to extol communal living, increase commune members' commitment to communalization, and reduce disputes which interfered with production."²⁰

C. Abuses of the Dispute Resolution System

The first Chinese Communist Constitution was adopted in 1954. It provided for limited individual rights in court proceedings - such as the right to an open trial, and right to a defense, for an independent judiciary, and for general adherence to the rule of law. In this period of emergent legalism, the formally adopted Provisional Rules Governing the Organization of People's Mediation Committees (1954) required voluntary

18. See generally Lubman, *supra* note 12.

19. Lubman, *supra* note 12 at 1339.

20. Lubman, *supra* note 12 at 1340.

CIVIL DISPUTE PROCESSING IN CHINA

participation in mediation and the opportunity for parties to choose to go to trial subsequently.²¹

Rejecting the emergent legalist program, Mao, in the Anti-Rightist movement (1957-58), explicitly rejected the legalist approach in favor of development of "proletarian" legal and dispute resolution systems.²² Mao's rhetoric emphasized the dangers of the Right, which included bureaucracy, class oppression, and the continuing need for class struggle against the enemies of the Party. Instead of a rule of law, Mao promoted the "rule of men," an ideology of the "mass line," which included mass participation in law making and law application as well as decisions made by Party cadres. Consistent with his anti-bureaucratic or anti-rule oriented theory of mass participation in government, he favored replacing judges that were trained in law with untrained workers, who would decide cases on the facts and with reference to Party policy.

As to cases before the court, Mao rejected decisions that applied rules and standards. Instead, most court decisions analyzed the "concrete situation." The "concrete situation" consisted of the facts as determined at the site of the dispute or alleged crime and the attitudes of the people most proximate to the case - neighbors, coworkers, local committeemen, and Party cadres.

Believing in constant revolution and struggle as an efficient means to move Chinese society, in the Anti-Rightist movement (1957-58) and in the Great Proletarian Cultural Revolution (1966-76), Mao endorsed the purges, removal, and frequent persecution of bureaucrats, and court personnel, who were in positions of authority. During the Cultural Revolution, the pre-established People's Court system was bypassed in favor of ad hoc "revolutionary" judicial processes. Thus, cases were less often decided based on the law than on the Party line as interpreted by cadres. Whereas trials were held only to publicize decisions in cases where Party officials desired to "educate" the public, the actual case decisions were made in nonpublic meetings of judges and Party cadres.²³ Consequently, mass trials were staged where hundreds or thousands of "convicted" people were "encouraged" and "persuaded" to confess in front of crowds of thousands.

Mediation Committee activities were also highly politicized during the Cultural Revolution. Because mediation was no longer a voluntary and noncoercive process, it became a means to identify deviant behavior and to "persuade" and "educate" the masses about "correct" Party ideology.

21. See CIVIL PROCEDURE LAW, *supra* note 11, art. 14 (a later version of these rules).

22. HARDING, *supra* note 2, at 28.

23. Martin Garbus, *Justice Without Courts a Report on China Today*, 60 JUDICATURE 395 (1977).

Mediation committee work was politicized, directive, and less concerned with peacemaking and dispute settlement than with ideological objectives. Mediation was no longer a means for dispute resolution. "The real resolution of disputes occurred in the streets . . . in struggle sessions, wall poster displays, and informal dispute adjustment techniques in local units."²⁴ According to some accounts, political persuasion by Neighborhood Committees and Party cadres during the Cultural Revolution was so unrestrained that parties in civil disputes who ran afoul of the Red Guards were verbally abused, beaten, and sometimes transported to distant camps, and never seen again.²⁵ Neighborhood groups used "struggle sessions" to "reeducate" and "persuade" "antisocial" group members to change their anti-state attitudes by shouting at them or beating them.²⁶ In an article written prior to the Cultural Revolution, Stanley Lubman described the situation:

[The] report makes clear the Party's intent to use dispute resolution as a political instrument to mobilize support for the Communist Party among the peasants. The politicalization of mediation is evident in the emphasis on class warfare, on cadres serving the masses, of changing the thought of disputants by changing their attitude(s).²⁷

After Mao's death, one of the most important goals of the new Party leadership was to reform the legal system, including the dispute resolution system. Today, there are three major dispute processing institutions in China: the People's Mediation Committee system covers domestic and workplace disputes, the People's Courts handle both civil and criminal cases, and the government administrative agencies include Arbitration Commissions as well as general regulatory adjudication agencies. The sections below describe how arenas for dispute processing have changed during the first decade of reform in China.

IV. REFORM OF DISPUTE SETTLEMENT PRACTICES

Reform of the Chinese legal system in the 1980's in many cases restructured dispute settlement procedures. The new statutes, incorporating

24. *Id.* at 398.

25. FOX BUTTERFIELD, CHINA ALIVE IN THE BITTER SEA (1982).

26. *Id.*

27. Lubman, *supra* note 12, at 1284.

CIVIL DISPUTE PROCESSING IN CHINA

and extending previously "temporary" laws and policies, established standards that affected both court procedures and mediation practices. For example, prior to the Reform movement, the essentially political character of mediation routinely allowed Mediation Committees to be directly controlled by Communist Party cadres. During the period of reform, the government moved to rationalize the operation of the hundreds of thousands of informal mediation systems, to codify procedures, and, at least compared to past conditions, to reduce abuses of the mediation system.

In China, mediation is perceived as a requirement for government agencies, schools, and businesses; neighborhood, factory, and village nongovernmental organizations; and more formal dispute settlement institutions - courts and arbitration panels. Because mediation has long traditions in Chinese culture, it provides the basic paradigms guiding the processing of most civil disputes in China. The sections below describe the arenas for dispute processing in China and illustrate that the changes initiated in the decade of Reform have affected mediation practices in each of the different settings.

A. The People's Mediation Committees

The People's Mediation Committee system has no analog in the West. It is a massive state sponsored system organized to promote settlements in domestic and workplace disputes and to further Communist Party interests in current social policies. Technically, the People's Mediation Committees are nongovernmental organizations. But the central government, through the Justice Department, establishes broad policy for the Committees. Furthermore, the Provincial and major urban governments have direct policy control over the Committees, which regard themselves as nongovernmental "mass" organizations.²⁸

Committees are formed to service natural social groups: the most common are Neighborhood Mediation Committees in urban areas, Village Committees in rural areas, and Mediation Committees in factories or other work places. The number of these committees is staggering: the total in China is approximately seven hundred fifty thousand. Committees can be found in most neighborhoods (approximately two thousand residents),

28. Li, *supra* note 15, at 59.

factories, office work sites, subunits of agricultural communes, rural Townships, and villages.²⁹

The Committees generally have three to eleven members, who are elected for terms of two years by voters in the group serviced by that committee. Still, committee members (called mediators) frequently serve several terms. Most mediation positions are voluntary and not paid.³⁰ Qualifications for selection (election) are presumed to be "fairness, some knowledge of the law, and good relations with the people."³¹ Overall there are more than four million designated mediators in the country.³²

The People's Mediation Committees usually deal with civil disputes, but occasionally they are asked to intercede in minor criminal cases. Thus, their cases typically involve disputes between family members, coworkers, or neighbors. A recent government survey found that forty-seven percent of cases were marital disputes; fifteen percent were other family disputes; fifteen percent involved housing disputes; thirteen percent were neighborhood disputes; and ten percent of the cases were disputes in the area of management/production.³³ The Mediation Committees are so pervasive as part of ordinary life in China that their function is well integrated into domestic affairs.³⁴

In their own analysis of the impacts of the Mediation Committees, government officials have claimed that the Committees resolved almost seven million disputes in 1987, including sixty-eight thousand cases that would likely have escalated into serious criminal cases if mediation had not been available. They further estimate that one hundred three thousand unnatural deaths (mostly suicides) were prevented through mediator intercession.³⁵ In addition, state analysts claim that besides significantly reducing court caseloads Mediation Committees serve as community study

29. Deputy Director of Mediation Department, Ministry of Justice Liu Zhitao, Address to Delegation of U.S. Practitioners of Alternative Dispute Resolution (May 30, 1988). See also *Mediation Settles 6.47m Civil Disputes*, CHINA DAILY, August 19, 1986, at 1 (1984 statistics).

30. The general rule is that Mediation Committees shall not charge for services. FBIS Organic Rules Promulgated for Mediation Committees, art. 11, (1989) states "People's mediation committees shall not collect any fee for mediating civil disputes." However, in an innovation, the new enterprise "contract system" has been applied to mediation. "[M]any villages have entered into agreements with their mediation committees whereby, upon meeting certain objectives such as reduction of the number of conflicts, mediators can themselves earn yearly cash awards." Song Tallang & Philippe Gagnon, *Mediation Committees are Revitalized*, CHINA DAILY, December 31, 1986 at 1.

31. Li, *supra* note 15, at 59.

32. *Id.*

33. *Id.*

34. Cheng Gang, *The Neighborhood Committee - Residents' Own Organization*, BEIJING REVIEW, April 9-15 at 26.

35. *Mediation Settles 6.47m Civil Disputes*, CHINA DAILY, August 19, 1986, at 1.

CIVIL DISPUTE PROCESSING IN CHINA

centers on the law, disseminate the law to the people, and educate the people in good social policy - all of which are important state purposes.

The People's Mediation Committees have carved out a unique role in Chinese society: they act as monitors in maintaining the fabric of social life in China. Again, they have no real counterpart in the West. Mediation Committees attempt to head off domestic disputes before they escalate; and they may act as "on the spot" social welfare agency or rescue squad representatives. They function by monitoring relations in the family and at the workplace. This level of inquiry would be intrusive to Westerners. If attention is called to a disturbance between individuals, a mediator will attempt to intercede, find out the facts, and then move the individuals toward reconciliation.

B. Privacy, Party Interests, and Mediation

Privacy rights, including, most importantly, "the right to be let alone," are not dominant themes in Chinese domestic life.³⁶ Mediation Committee work is rooted in the traditional Chinese values of the maintenance of interpersonal relationships and of social group harmony. To these traditional concepts, the Communists added the political role of the Mediation Committees which acted as transmitters of the social norms approved by the government and Party policy objectives. A mediator is more than a neutral third party: he or she, at least in part, is recognized as a conveyor of "correct" policy. This political role was exaggerated during the Cultural Revolution, where mediation was arguably most heavily influenced by politics and compulsion.³⁷ Indeed, in the 1960's, western observers of Chinese mediation often noted that it was little more than direct state sponsored control of individuals at the level of the smallest social group.³⁸ During the Cultural Revolution, mediators were Party cadres, who used disputes as vehicles to publicize "correct" state policy and to punish disputants who were on the "wrong" side of that policy.

In 1991, while Mediation Committees continue to act as transmission belts for important governmental and Party policies, they no longer function as monitors of pervading political attitudes. In describing their role, mediators see their primary functions as resolving disputes,

36. Walter Gellhorn, *China's Quest for Legal Modernity*, 1 J. OF CHINESE L. 1, 21 (1987) ("[t]he right to be let alone" is 'the most comprehensive of rights and the right most valued by civilized men.' " (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928))).

37. Lubman, *supra* note 12, at 52.

38. Jerome A. Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CALIF. L. REV. 1201 (1966); Stanley Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 CALIF. L. REV. 1284 (1967).

serving their clients under the law, and educating the public on the meaning of the law for civil cases.³⁹

Today, Chinese Communist policy is directed at legitimizing, regularizing, and reforming the People's Mediation system, with the intent to move it away from the role it played during the Cultural Revolution and thus place the entire mediation process in a more "lawful" context. Subsequently, the Mediation Committee system is referenced in the most recent Constitution and in new statutes that describe both the voluntary nature of the process and the rights that individuals have in mediation.⁴⁰

In discussing their practice, local mediators stress that their role is to persuade, to educate, and to promote lawful behavior.⁴¹ In attempts to fulfill this role they may use considerable energy, but current evidence suggests that the coercion associated with mediation in the past is absent today.⁴² There is a new emphasis on lawful action that seems indicative of the Reform movement in general. Thus, a lessening, although not complete withdrawal, of direct Party involvement and politicalization of the People's Mediation system is apparent. The Party, however, remains the authoritative body determining social relations.

Furthermore, today individual rights are not prominent elements in dispute resolution practice. Within the legal system, for example, the point has been made that:

[e]ven in respect of 'the most fundamental rights,' . . . the meaning . . . of legal propositions are 'determined through face-to-face negotiation, mediation, or settlement by direction of an administrative superior In many cases, the last word in

39. In 1988, in a series of presentations and interviews with members of a U.S. Alternative Dispute Resolution Delegation, Chinese mediators and civil justice administrators in three cities described the role and functions of the People's Mediation Committees, and of their practice of mediation. Their presentations emphasized that mediation is a community service. They describe their most important role as education, on the theory that proper understanding of society's rules would lead to avoidance of disputes. They take pains, however, to distinguish their advocacy of social "education," from the political dimensions of Maoist "education" exemplified by the struggle sessions of the Cultural Revolution.

40. See THE CONST. OF THE P.R.C., translated in, I Statutes and Regulations of the People's Republic of China (University of East Asia Press and Institute of Chinese Law (Publishers) Ltd.) No. 821204, art. III (1983); CIVIL PROCEDURE LAW, *supra* note 11, art. 97-102.

41. Cheng Gang, *The Neighbourhood Committee - Resident's Own Organization*, BEIJING REV., April 9-15, 1990 at 26.

42. Daniel Southerland, *Chinese Boost Birth-Control Campaign; Family Planners to be Increased*, WASHINGTON POST, June 27, 1988 at A19. (One of the most controversial of Chinese policies has to do with family planning - the government policy of mandating single child families. When local officials implementing this policy reportedly used extreme verbal coercion and abuse, and threats of forced abortion and sterilization on women pregnant with a second child, the national government responded with a policy emphasizing training an additional twenty-five thousand family planners. "[F]amily planning workers had been advised not to use coercion to enforce birth control policies.").

CIVIL DISPUTE PROCESSING IN CHINA

interpretation of laws . . . has been the opinion of the local Party organization. Its decision is essentially a moral or political statement and is not a carefully reasoned legal opinion."⁴³

Where the meaning of "the most fundamental right" is determined without reference to legal standards, the potential for disregard of an individual's rights is real: this seems to be the condition under which contemporary domestic mediation functions in the People's Republic. The most recent Constitution has sections specifically addressing an individual's rights; and the mediation statutes clearly state that mediation is a voluntary process in which participation shall not be compelled.⁴⁴ However, descriptions of the mediation process by participants suggest a strong component of advocacy by mediators. Mediator advocacy, in turn, rests on the perception that the mediator's role is one of "education" and "persuasion" toward the correct conditions of settlement.

Individuals resisting the efforts of mediators are seen as perpetuating conflict against the interests of the state. Even though disputants have the right to reject mediation and move to litigation, the peer pressure of the social group represented by the Mediation Committee may be very difficult to resist. In fact, one current statistic is that ninety-eight percent of disputes handled by the People's Mediation Committees are settled through mediation.⁴⁵ This suggests that mediation may be necessary to settle domestic and workplace disputes. A mediation process capable of settling nearly all disputes must be perceived by disputants as having an extremely high legitimacy. But, high levels of pressure from peers, social groups, the Party, and government authorities may be required to achieve such effective results.

C. The Mediation Process

Mediation of domestic or workplace disputes begins either when a disputant solicits involvement by a Mediation Committee or when an individual mediator takes the initiative. Reports by concerned individuals in a neighborhood, village, or workplace may trigger mediator initiated

43. Walter Gellhorn, *China's Quest for Legal Modernity*, 1 J. OF CHINESE L. 1, 17 (1987) (quoting R. Randle Edwards, *Civil and Social Rights: Theory and Practice in China*, in HUMAN RIGHTS IN CONTEMPORARY CHINA 46 (R. Edwards, L. Henkin & A. Nathan eds. 1986).

44. CIVIL PROCEDURE LAW, *supra* note 11, art. 14 ("Under conditions prescribed by law and in accord with the principle of voluntary participation, the People's Mediation Committees conduct mediation work . . .") (emphasis added).

45. This statistic was put forward in meetings with mediators from Mediation Committees in urban, factory, and rural village settings. These meetings were several thousand miles apart.

dispute resolution. Additionally, a committee member may without any knowledge of a dispute situation routinely visit families to discuss any potential problems before they might erupt into a serious domestic dispute; the head of one village mediation committee referred to this process as "preventive work."⁴⁶ State officials report that when a mediator initiates dispute resolution and then conducts it in a practical manner the process works well and results in a "good experience."⁴⁷

According to the law, acceptance and participation in mediation is voluntary. Accordingly, one section of the Civil Procedure Law states: "When an Agreement is attained through mediation, it must be based on the willingness of both parties; *compulsion is not permitted*" (emphasis added).⁴⁸ Yet, it is difficult to determine the current standard of practice by mediators who face parties who would rather go to court, or otherwise reject mediation. If a Mediation Committee feels that a dispute's effect will extend beyond the disputants, it will put a reasonable degree of pressure on the parties to mediate. The voluntary nature of mediation is probably less clear to individuals in community settings because they perceive themselves as being integrated in a local social group or the local government, both of which the Mediation Committee is a unit.

After the parties have accepted a mediator, the active mediation process begins. It has three elements: investigation, analysis, and the action component. In the Chinese model the mediator engages in fact-finding to enable him or her to determine the "right or wrong" involved in the case. Then the mediator defines a strategy and tries to persuade the parties to accept a settlement. Mediators may spend considerable time in meetings with the parties; some mediation efforts may last one or two years. In one case, the mediator spent more than a year working with the parties. The aggrieved party, who was a boy that had threatened to scar the face of his cousin after being informed that he could not marry her, ultimately withdrew his threats and ended his anger. He said that the mediator's personal involvement, which included bicycling the distance between the parties each week for the entire year, convinced him of the social importance of ending his threats and settling his grievance.⁴⁹

46. Cheng Su Hua, Address at the Yu Tang Township Mediation Committee, Chendu City (June 8, 1988) (It is not known whether such unsolicited home visits are usual in urban settings as well as in this formerly urban village).

47. It must be assumed that Chinese justice and mediation officials briefing visitors are mostly representing official images of their work. Most of their statements are uncritical and unreflective, and cannot be taken at face value. However, the same statements can validly be assumed to reflect the government's idealized vision of how it would like its dispute resolution system to function. See also *supra* note 38.

48. CIVIL PROCEDURE LAW, *supra* note 11, art. 100 (emphasis added).

49. Presentation of a mediation case to a tour of U.S. professionals in alternative dispute resolution, Nanjing Machine Tool Works (June 2, 1988).

CIVIL DISPUTE PROCESSING IN CHINA

The mediators themselves describe their own practice as requiring persuasion, education, and persistence. They become a part of each case as they invest time and energy into building trusting relations with the parties and instilling a sense that they, as mediators, represent the social environment which means they must exhibit a caring and positive feeling for the situation of the disputants.

Settlements made with the help of the People's Mediation Committees, are often informal and not written. Sometimes agreements are written, but these are not directly enforceable documents. Where negotiated settlements cannot be reached, or where they are reached and then violated, parties may turn to the People's courts. These courts also have a formal mediation process.

D. In-Court Mediation

The average citizen in China is skeptical and distrustful of litigation and of court adjudication of disputes. Prior to the initiation of the Reform in 1978, these traditional reservations were reflected in the Communist Party's deemphasis of written law, its disregard for a professional judiciary, its violent attacks on legal institutions - including their personnel, and its reliance on the People's Mediation Committees as the primary civil dispute resolution system.⁵⁰ When the social and political reforms began in 1978, these reservations were reversed as the institutions were given more credibility than at any other time since the ascent of the Communist government. The new emphasis on legality, has not, however, led to a corresponding decline in importance for the People's Mediation Committee system; the system is still the first line for domestic dispute resolution. Furthermore, the legal emphasis has not disturbed the role of mediation within court processes. Mediation, which is an established duty of the court, is the topic to which we now turn.

China is not a litigious society; today, most civil cases are settled in the mediation processes. Compared with American courts, few civil and economic disputes are litigated in China. The creation of legally

50. Presentation by a Judge of the Beijing High Court to a tour of U.S. practitioners in alternative dispute resolution (June 1, 1988) (in Beijing, in a recent year, the case load of the People's Mediation Committees was reported to be six times that of the Beijing Court's civil calendar, "freeing the court for the most serious cases, and reducing unnecessary litigation.").

enforceable civil rights - including property rights - led to a rapidly growing caseload for the expanding People's Court system.⁵¹

Cases heard by the People's Courts generally fall into the following categories: (1) criminal cases, (2) civil cases where disputants reject People's Mediation Committee efforts, (3) economic contract disputes that may involve individuals, state enterprises, or administrative agencies, and (4) economic cases involving foreign investment. In virtually all of these categories, courts are instructed to attempt settlement through means other than adjudication. While in roughly seventy percent of the civil cases mediated settlements obviate the need for judicial decisions, analysis of the process suggests that court mediated decisions may reflect a high degree of compulsion or possibly coercion to settle. Case outcomes are frequently court confirmed settlements rather than court orders.

Whereas United States (U.S.) court procedure is regulated by the adversarial process, Chinese litigation places the court in a dialogue between the parties. With few exceptions, U.S. court procedure requires judges to maintain distance from the parties, to avoid ex parte contacts, to direct exchanges on the merit of positions, and to preserve their neutrality in the cases before them. Civil and criminal procedures in the U.S. require judges to evenhandedly manage the adversarial process. Judges in the U.S. are taught to adjudicate cases before them, but not to jawbone parties into settlements.

In China, the role of the court is different. Chinese courts see themselves as fact-finders who decide right or wrong, and as facilitators, who create settlement conditions between litigating parties. This second function is regarded as so much a part of the court's role that it is labelled "in-court mediation," and has become a statutory function of the court. The Civil Procedure Law requires that: "In trying civil cases, the People's Courts should stress mediation; when mediation efforts are not effective, the court should issue its decision in a timely manner."⁵² The emphasis is clear: mediation is a duty of the court. If it is possible that parties may settle, then the court is obliged to aid mediation. If the parties reject mediation, then the court should not prolong its effort nor coerce

51. Whitmore Gray & Henry R. Zheng, *General Principles of Civil Law in the People's Republic of China*, 52 LAW & CONTEMP. PROBS., Spring 1989, at 27; Tong Rou, *The General Principles of Civil Law of the PRC: Its Birth, Characteristics, and Role*, 52 LAW & CONTEMP. PROBS., Spring 1989, at 151.

52. CIVIL PROCEDURE LAW, *supra* note 11, art. 97 ("If a civil case . . . can be mediated, the court should, based on an examination of the facts and on distinguishing between right and wrong, conduct mediation and urge the parties to understand each other's positions and reach an agreement.").

CIVIL DISPUTE PROCESSING IN CHINA

settlement, but should move to its adjudicatory function and issue its decision.

The Civil Procedure Law statutes include other guides for the "in-court mediation" process. The statutes require mediation to be a voluntary process and prohibit the court from using compulsion to gain a mediated settlement.⁵³ Furthermore, mediation is to be conducted by a single judge or a panel of judges.⁵⁴ Mediated settlements may be entered as enforceable decrees of the court, which are signed by a judge and clerk of the court.⁵⁵ Finally, statutes allow for appellate courts to also mediate cases. If a settlement is reached in an appellate court, then the decision of the trial court may be set aside.⁵⁶

The emphasis on avoiding compulsion in court mediation is significant. In Communist China, an independent judiciary has not been considered because it would be viewed as incommensurate with the notion of the Party as the sole source of legitimacy. Party Committees appoint judges who are responsive to the Party as well as to the government.⁵⁷ Judicial decisions reflect local government and Party Committee views, as well as views of the relevant "mass organizations," such as neighborhood or workplace committees. As Zhang noted:

Court adjudication of responsibility contract disputes has not been only a matter of law and [Party] policy. Judicial decisionmaking also has been based on the opinions of local government officials. Deference to local government bureaucrats . . . is a reflection of the political realities of Chinese society. In comparison to the dominant institution of the Party and the powerful Chinese state bureaucracy, the judiciary wields little or no power.⁵⁸

Judicial decisions in civil matters are "socialized" in the sense that they are seen as elements of a social process, which is designed to educate the community. In this system, the affected community participates directly in the judicial process. Judges often visit the sites of disputes or

53. CIVIL PROCEDURE LAW, *supra* note 11, art. 100.

54. CIVIL PROCEDURE LAW, *supra* note 11, art. 98.

55. CIVIL PROCEDURE LAW, *supra* note 11, art. 101.

56. CIVIL PROCEDURE LAW, *supra* note 11, art. 153.

57. Phyllis L. Chang, *Deciding Disputes: Factors that Guide Chinese Courts in the Adjudication of Rural Responsibility Contract Disputes*, 52 LAW & CONTEMP. PROBS., Summer 1989, at 101 ("Party domination of judicial affairs has characterized political-judicial relations since the founding of the PRC. Judicial independence . . . has never existed in practice But there is reason to believe that the Party today no longer systematically intervenes in all, or the great majority of, civil lawsuits However, the search for norms or other factors that guide judges must be anchored in the acknowledgement that they may frequently or occasionally be secondary or irrelevant in a judicial system that is still very closely controlled by members of the ruling political elite.").

58. *Id.* at 139.

crimes, and take direct testimony from neighbors, workers, mediation committee members, or Party cadres. Often judges may discover first-hand political lessons in a case.

The in-court mediation process relies on the tradition of judicial involvement in swaying a community's or the disputant's sentiments in a case. Where mediation by the People's Mediation Committees has not prevented civil litigation, the judge undertakes fact-finding, and commences mediation. This mediation differs from the nonjudicial People's Mediation process because the process will result in an enforceable dispute settlement. Therefore, judges are in a strong position to "persuade" disputants to accept a preferred settlement. In this setting, the statutory admonition that prohibits compulsion in mediation must be viewed as a reaction to abuses.

In many disturbing vignettes from the time of the Cultural Revolution (1966-76), Fox Butterfield tells of men and women who were detained, arrested, and beaten.⁵⁹ They received no trial, but based on flimsy accusations they were sent away for years by the Red Guard.⁶⁰ Butterfield's stories make clear how complete the power of the Red Guard was during its ascendancy and how the judiciary was either ignored or was totally under the Red Guard's influence. In a different vein, Martin Garbus, describes a major criminal case of embezzlement from a factory. Here, the judge, who was untrained in law, conducted a judicial process by relying almost completely on interviews with the defendant's co-workers, worker committees, and Party cadres.⁶¹ After fact-finding, the judge concluded that the defendant was guilty. A decision to hold a trial was later made after consultation with a senior judge and Party cadres. As portrayed by this case, the sole function of the trial is not to determine guilt or innocence, but to educate the people - a political objective, rather than a judicial one.

While the thrust of the post-Mao reforms has been to move the legal system away from stark political control of the judiciary, the 1990 trials of the Tiananmen Square dissidents demonstrated that Party control remains firm. In those cases the judiciary was engaged in what can only be called show trials - forums to accept guilty pleadings and to pronounce predecided sentences. In regard to the 1990 trials of dissidents, the Chinese government has found it is important to present its actions as being controlled by established legal procedures. For example, shortly after the worst events in the summer of 1989, the English newspaper in

59. BUTTERFIELD, *supra* note 25, at 399.

60. *Id.*

61. Garbus, *supra* note 23, at 399-400 (The judge was a field worker, selected for his ideologically correct record with the party.).

Beijing stated that "[l]ocal courts should ensure that all cases are handled strictly according to law by making the facts clear and the evidence conclusive."⁶² "The newspaper noted that the crushing of the counterrevolutionary rebellion in Beijing early this month was a struggle to safeguard the Chinese Constitution and the socialist legal system."⁶³

Of course, the reality of the court system is quite different from the espousals of procedural fairness discussed above. Yet, the official rhetoric indicates the importance which is placed on the appearance of due process and the rule of law in contemporary China. There is more at work here than simply a desire of the old guard to cloak the deeds in legality. Today, legal development and reform can be seen in virtually all arenas in Chinese society except the management of political dissonance. This evolving legal system is, however, designed more for serving state interests in promoting respect for authority and for predicating judicial performance which is important in developing an enterprise system and for attracting foreign capital.

Despite the abuses, which continue to illustrate that the government and Party still control the judiciary, the merits of in-court mediation may be instructive for non-Chinese court systems. After fact-finding, judges are in a special position to mediate, because parties settle disputes, that they have become emotionally committed to litigating. There are many experiments with court-related mediation in the U.S., but the Chinese experience offers a new model for experimenting in certain litigation areas. Such experimentation would lead to the development of adequate procedures, which balance parties' legal rights with the court's interests of effective administration of justice and equitable dispute resolution.

E. Commercial Dispute Resolution

When China made economic growth a priority in the 1980's, it created new policies and laws supporting foreign investment and commercial enterprise. Some of these policies dealt with dispute resolution in commercial activities. The Chinese legislature deemed enhancement of formal, and internationally-approved, commercial dispute processing institutions as necessary additions to China's laws.

Prior to 1978, with the exception of the Foreign Trade Arbitration Commission (1954) and the Maritime Arbitration Commission (1958), commercial dispute settlement practice in China was limited to informal negotiation and mediation. Submission of a commercial dispute to the

62. *Top Court Calls for Quick Trials*, CHINA DAILY, June 22, 1989, at 1.

63. *Id.*

court was an unusual circumstance. Until the reform period, the two arbitration commissions, which had been created in the 1950's to enable China to participate in international trade, did not actually arbitrate disputes nor issue awards, except in a handful of cases.⁶⁴ Actually, Mao's government was not interested in actively developing international commercial activities or such institutions. Under the new laws and policies since 1978, the government has, however, developed the necessary legal infrastructure to facilitate commercial development and commercial dispute resolution. New economic courts now adjudicate disputes involving enterprise relationships, while new arbitration tribunals have been established in the major foreign investment areas. Mediation⁶⁵ remains the primary state sponsored means for dispute settlement, but it is now placed in a legal context where arbitration and the judicial process are alternatively available.

To support its goals of achieving modern economic development, China's government has adopted a number of new laws that provide an infrastructure of legal rights and duties for all commercial transactions.⁶⁶ For example, the Economic Contract Law which establishes the principles of China's contract law, specifies the contractual rights and duties of "legal persons" and establishes the basis for individual entrepreneurship, in contracts with either state enterprises or communes.⁶⁷ The Joint Venture Law establishes the basis for foreign investment in cooperation with state and provincial enterprises.⁶⁸ Finally, Foreign Economic Contract Law

64. Jerome A. Cohen, *The Role of Arbitration in Economic Cooperation with China*, in *FOREIGN TRADE, INVESTMENT, AND THE LAW IN THE PEOPLE'S REPUBLIC OF CHINA* 508-31 (Michael J. Moser ed., 2d ed. 1987).

65. Writers on Chinese commercial law reference the term "conciliator" in preference to "mediator," perhaps to distinguish their process from the practices of the People's Mediation Committees. Interviewed officials of a Chinese Arbitration Commission indicated they practice both conciliation and mediation, but were unable to distinguish between the two processes.

66. See, e.g., *LAW OF THE P.R.C. ON JOINT VENTURES USING CHINESE AND FOREIGN INVESTMENT*, translated in, I Statutes and Regulations of the People's Republic of China (University of East Asia Press and Institute of Chinese Law (Publishers) Ltd.) No. 790708 (1979) [hereinafter *JOINT VENTURE LAW*]; *FOREIGN ECONOMIC CONTRACT LAW OF THE PEOPLE'S REPUBLIC OF CHINA*, translated in, II Statutes and Regulations of the People's Republic of China (University of East Asia Press and Institute of Chinese Law (Publishers) Ltd.) No. 850321 (1985) [hereinafter *FOREIGN ECONOMIC CONTRACT LAW*].

67. *ECONOMIC CONTRACT LAW OF THE P.R.C.* translated in, I Statutes and Regulations of the People's Republic of China (University of East Asia Press and Institute of Chinese Law (Publishers) Ltd.) No. 811213.1 (1981), [hereinafter *ECONOMIC CONTRACT LAW*].

68. *JOINT VENTURE LAW*, translated in, I Statutes and Regulations of the People's Republic of China (University of East Asia Press and Institute of Chinese Law (Publishers) Ltd.) No. 790708 (1979).

along with other statutes, establishes a new framework for commercial relations and foreign investment.⁶⁹

Without these statutes, which establish both parties' legal rights or duties and an apparatus by which to settle disputes, foreign investors would not be assured that China offers an adequately stable legal and political environment to protect the investments. Indeed, during the Cultural Revolution a well-known dispute arose between the Anglo-German company Vickers-Zimmerman and a provincial enterprise.⁷⁰ When Vickers-Zimmerman called for international arbitration, which was a term of the contract, the Red Guard deported one company representative, imprisoned another for three years, and had the court levy a fine on the company that was equivalent to the damages the company had argued it suffered.⁷¹ The case destroyed China's credibility in the international commercial community.

The new commercial laws reveal the Chinese preference for mediation prior to enforceable dispute settlement. These laws also indicate a preference for settling commercial disputes through arbitration instead of litigation. From a Chinese perspective, commercial relations extend over time; disputes are characterized by mutual accommodation for the sake of the continuing future relationships. Consequently, litigation which is an adversarial process, may be tantamount to ending the commercial relationship.⁷² This preference for arbitration versus litigation is evidenced by the prevalence of arbitration as the primary dispute settlement mechanism in the new statutes.

The Foreign Economic Contract Law and the Joint Ventures Law provide for arbitration of contracts before a Chinese arbitration body or, if a contract so specifies, before an international arbitration body.⁷³ These two statutes require dispute resolution by the Chinese courts even if

69. FOREIGN ECONOMIC CONTRACT LAW, *translated in*, II Statutes and Regulations of the People's Republic of China (University of East Asia Press and Institute of Chinese Law (Publishers) Ltd.) No. 850321 (1985).

70. Jerome A. Cohen, *The Role of Arbitration in Economic Cooperation with China*, in FOREIGN TRADE, INVESTMENT, AND THE LAW IN THE PEOPLE'S REPUBLIC OF CHINA 508 (Michael J. Moser ed., 2d ed. 1987).

71. *Id.* at 508-31.

72. William T. O'Hara, *Dispute Resolution in the Union of Soviet Socialist Republics and the People's Republic of China*, R.I.B.J., February 1985, at 4, 7.

73. FOREIGN ECONOMIC CONTRACT LAW, *translated in*, II Statutes and Regulations of the People's Republic of China (University of East Asia Press and Institute of Chinese Law (Publishers) Ltd.) No. 850321 (1985). JOINT VENTURE LAW, *translated in*, I Statutes and Regulations of the People's Republic of China (University of East Asia Press and Institute of Chinese Law (Publishers) Ltd.) No. 790708 (1979).

arbitration is not included in the contract.⁷⁴ Thus, commercial arbitration as a means of dispute resolution is implied in all joint-venture contracts approved by the Chinese government. The Economic Contract Law, applying to Chinese enterprises, provides options for the settlement of disputes between provincial enterprises and other "legal persons."⁷⁵ These options are mediated by the government agency regulating the commercial activity, arbitration, and litigation.

[W]hen a dispute arises . . . concerned parties should promptly settle the dispute through consultations. When an agreement cannot be reached through consultations, any one of the concerned parties may apply to the contract control authorities . . . for mediation or arbitration or a suit may be initiated directly in the People's Court.⁷⁶

Arbitration in commercial disputes has been enhanced by the development of formal arbitration procedures that are comparable to the procedures used in other Chinese arbitration practices and by the creation of new arbitration commissions.⁷⁷ Formerly, all trade disputes were submitted to arbitration in Beijing. Now, each of the Special Economic Zones has its own arbitration commission, making the dispute settlement

74. FOREIGN ECONOMIC CONTRACT LAW, No. 880413.1 which provides:

In the case where any dispute arises between Chinese and foreign cooperators over the implementation of a contract of cooperative enterprise, it shall be settled through consultation or reconciliation. If the Chinese and the foreign cooperators are unwilling or fail in their attempt to solve the dispute through consultation or reconciliation, they may submit the case to arbitration by an arbitration organization in China or to other arbitration organizations in accordance with the provisions on arbitration in the contract of cooperative enterprise or any written arbitration agreement reached after the signing of the contract.

FOREIGN ECONOMIC CONTRACT LAW, *translated in*, V Statutes and Regulations of the People's Republic of China (University of East Asia Press and Institute of Chinese Law (Publishers) Ltd.) No. 880413.1 (1988).

75. ECONOMIC CONTRACT LAW OF THE P.R.C. *translated in*, I Statutes and Regulations of the People's Republic of China (University of East Asia Press and Institute of Chinese Law (Publishers) Ltd.) No. 811213.1 (1981) [hereinafter ECONOMIC CONTRACT LAW].

76. ECONOMIC CONTRACT LAW OF THE P.R.C., *translated in*, I Statutes and Regulations of the People's Republic of China (University of East Asia Press and Institute of Chinese Law (Publishers) Ltd.) No. 811213.1, art. 48 (1981).

77. Charles Pettit, *Dispute Resolution in the People's Republic of China*, 39 ARB. J. 3 (1984) ("[T]he Provisional Rules of Procedure are, for the most part, conspicuously clear, comprehensive, flexible, orderly, and well set out . . . In general, one could say that the Chinese rules would form an adequate modus operandi for a tribunal in New York or London.").

process more available to foreign investment and trade. Although formal arbitration is favored over litigation as a means of settling commercial disputes, the Chinese clearly regard formal arbitration as a last resort and seem to prefer mediation over arbitration. "Chinese negotiators still regard the arbitration process with distrust due to an ancient cultural aversion to settling disputes by litigation. A preferred method is 'talking disputes into harmony' through mediation."⁷⁸

As in the case of family or workplace relations, the Chinese regard commercial relations as long term commitments where difficulties are resolved in consideration of an ongoing future relationship. The Chinese approach to commercial relations for dispute settlement emphasizes a mutual adjustment in the parties' proposed positions. This "friendly consultations" approach is regarded as the first step in commercial dispute resolution. Parties are urged to maintain flexibility, to avoid defending an "abstract principle," to reach for accommodation, and to avoid "defining the problem."⁷⁹ If there is a failure to settle a dispute by themselves, then Chinese tradition emphasizes the need for parties to bring in a mediator to help resolve the dispute.

The emphasis on negotiated settlement is so strong that various levels of mediation may be identified. First, there is direct negotiation by the concerned parties to settle their dispute; this is called "friendly consultations."⁸⁰ Second, an attempt to mediate may be made by a secondary party to the contract.⁸¹ This secondary party will intervene because it will be affected by the dispute, but not because it is one of the disputants. A third level occurs when a Chinese administrative agency or arbitration commission is asked to arbitrate the case.⁸² Finally, the parties may choose court adjudication.⁸³

If the contract involved in dispute specifies arbitration and "friendly consultations" have failed, then the disputants may approach the arbitration commission. Thus, the arbitration process begins with an immediate effort to mediate the dispute. Mediation is not perfunctory, but is perceived as a primary function of the arbitration process. Consequently, mediation is continued throughout the entire dispute resolution process. If a negotiated settlement is not reached, then the

78. WALTER S. SURREY & STEPHEN M. SOBLE, *Recent Developments in Dispute Resolution in the People's Republic of China*, in *LEGAL ASPECTS OF DOING BUSINESS IN CHINA* 373, 378 (Jerome A. Cohen ed. 1983).

79. Roderick W. Macneil, *Contract in China: Law, Practice, and Dispute Resolution*, 38 *STAN. L. REV.* 303 (1986).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

arbitration panel will undertake the traditional approach, which includes fact-finding and opinion development. Again, the panel will never cease in its settlement efforts. Mediation continues even after the arbitration commission makes a determination on the merits of the dispute, although it may not have decided an appropriate remedy.⁸⁴ Often, the arbitration panel communicates its decision to the parties, which usually leads to one side wanting to settle.

The emphasis placed on negotiated settlements is illustrated by the statistics from a regional arbitration commission. Of fifty-four resolved cases initially submitted to the commission for arbitration, only eighteen, thirty-three percent, were settled after undergoing the complete arbitration process. The other two-thirds of the cases did not result in an arbitration decision because the plaintiffs either withdrew their arbitration request during the mediation process (which occurred in twenty-four percent of the cases) or the disputes were resolved through mediation (which occurred in forty-three percent of the cases).⁸⁵

The development of an institutionalized legal framework for commercial dispute resolution has enabled China to become a modern commercial and industrial state. The ancient emphasis on accommodation and maintenance of existing relationships, which has been adopted by the Chinese in regards to commercial relations, is also pivotal in the arbitration process as well as the court systems, where mediated settlements are now the goal. Arbitration and adjudication are always available as a means of dispute settlement, but the major emphasis of agency or court officials is toward promoting mediated or negotiated settlements.

V. REFORM OF THE LEGAL SYSTEM

Law reform since 1978 reflects an intent by political leaders to change the character of state and Party relations, which were first established by Mao Zedong. Mao emphasized the need for the creation of a new law and application of existing law through "mass lines" and "mass organizations." Since 1978, the Party has deemphasized these Party organs. Whereas Mao promoted antibureaucratic attitudes and supported

84. See generally Jerome A. Cohen, *The Role of Arbitration in Economic Cooperation with China*, in *FOREIGN TRADE, INVESTMENT, AND THE LAW IN THE PEOPLE'S REPUBLIC OF CHINA* 508-31 (Michael J. Moser ed., 2d ed. 1987).

85. Deputy Director of the Shenzhen Bureau of Justice Su Jan, Presentation on Shenzhen Arbitration Commission, June 12, 1988.

the doctrines of continuous revolution and class struggle, the reformers rejected these ideas as ill-suited to China's current developmental stage. They replaced the old ideas with a technical and rational legitimacy of law. Furthermore, the reformers supported the development of written laws, an administrative government, a functional judicial institution, and the reorganization of the legal profession. From Mao's charismatic leadership, China moved into the 1980's with a Weberian rational-legal outlook defining its socio-political paradigm.⁸⁶

The simplest explanation for this new emphasis on active law making and law development is that it was a necessary step towards achieving the goals of the government. These goals, labeled as the "four modernizations" were agriculture, science and technology, industry, and national defense. By the late 1970's, the political leadership understood that internal economic development and foreign investment would be restricted by an underdeveloped legal infrastructure or by a legal system that has been left in pieces by the effects of the Cultural Revolution.⁸⁷

In the aftermath of the Cultural Revolution, civil law was in disarray; there was little substance in the judiciary or other dispute processing institutions. The new leadership turned to rebuilding China's legal institutions. This change is reflected in the pragmatic approach the leadership took in stabilizing social relations, rejecting Maoist analysis regarding the continuity of social and class conflict. This new direction, taken since 1978, is evident (1) in the creation and modification of the new national constitutions (1978 and 1982), (2) in the passage of the first Civil and Criminal Codes since the Revolution,⁸⁸ (3) in the passage of a series of economic laws, which advance commercial transactions and economic development, (4) in the re-creation of judicial administration and judicial institutions, (5) in a new emphasis on training personnel in law, and (6) in new methods of disseminating the law to the people. These developments are introduced in the following sections.

A. Constitutional Reforms

86. HARDING, *supra* note 2, at 184.

87. SHAU-CHUAN LENG & HUNGDAH CHIU, *CRIMINAL JUSTICE IN POST-MAO CHINA: ANALYSIS AND DOCUMENTS* 36 (1985) ("After the 'lost decade' of chaos and struggle, China badly needs a regular legal order to ensure stability, unity, and an orderly environment essential to the successful development of its economy.").

88. Whitmore Gray & Henry R. Zheng, *General Principles of Civil Law in the People's Republic of China*, 52 *LAW & CONTEMP. PROBS.*, Spring 1989, at 27; Tong Rou, *The General Principles of Civil Law of the PRC: Its Birth, Characteristics, and Role*, 52 *LAW & CONTEMP. PROBS.*, Spring 1989, at 151.

Communist China's original Constitution, drafted in 1954, was revised in 1975 to incorporate the principles of the Cultural Revolution. Certain liberal sections of the earlier document were deleted in the 1975 revision. Legal maxims such as "all citizens are equal before the law," "presumption of innocence," and "rule of law" were rejected. Institutions, such as the jury system, public trials, legal defense, and the Procuracy, were deleted or severely curtailed. The 1975 Constitution promoted the "dictatorship of the proletariat," identified the Party as the same as government, and stressed rule by "mass line" and "mass organization" - the principles of Mao.

In 1978, after Mao's death, the new leadership quickly produced a new Constitution, restoring many of the 1954 provisions on legality and individual rights which had been deleted in the 1975 version. The new Constitution revived an individual's right to an open trial, but failed to restore the 1954 provisions concerning equality before the law and independence of the courts. "Judicial independence" and "equality before the law" resurfaced after the 1978 Constitution.

After the 1978 Constitution was drafted, it became apparent, that the new leadership, namely Deng Xiaoping, dissatisfied with the Constitution, leaned more toward reform and away from Maoism. Consequently, Xiaoping decided that the recent revision of the Constitution was inadequate to facilitate modernization and economic development.⁸⁹ The Constitution was amended in 1979. Then a new Constitution was drafted in 1982.⁹⁰ The latest version is a reformist document: it makes a clear distinction between the state and the Communist Party. Furthermore, it contains what may be considered a substantial and unprecedented movement toward separation of the legislative, executive, and judicial functions of government. In the new Constitution, the courts are declared independent of other organs of the state⁹¹ and new sections regarding individual rights are added. This new version also attempts to institutionalize the law by establishing that the Constitution itself, and the corresponding statutory law, are the only sources of law in the states, and by providing for the separation of powers, as described above.⁹² Accordingly, the preamble states that "the constitution . . . is the fundamental law of the state and has supreme legal

89. Wu Jianfan, *Building New China's Legal System*, 22 COLUM. J. TRANSNAT'L L. 1, 34 (1983).

90. See generally THE CONST. OF THE P.R.C., translated in, 1 Statutes and Regulations (University of East Asia Press and Institute of Chinese Law (Publishers) Ltd.) No. 821204 (1983).

91. *Id.* at art. 126, 131.

92. SHAO-CHUAN LENG & HUNGDAH CHIU, CRIMINAL JUSTICE IN POST-MAO CHINA: ANALYSIS AND DOCUMENTS 42 (1985).

authority."⁹³ Additionally, the text states: "[n]o law or administrative or local rules and regulations shall contravene the Constitution. No organization or individual may enjoy the privilege of being above the Constitution and the law."⁹⁴

In summary, the recent history of the Chinese Constitutions reflects a rejection of Maoist principles of government; in the place of Maoist notions is an emerging model of socialist law that, in many respects, incorporates traditional principles of Western law - rights of individuals, independence of judicial powers, and decentralization of political or governmental power. The constitutional language, however, does not reflect the reality of social life in China or in many other nations. For example, the statements regarding judicial independence are not yet enforceable policy and the Party retains the role of judicial decision maker whenever state or Party interests are affected by a case.⁹⁵ Officially, China remains committed to the "four principles": "the socialist road, the dictatorship of the proletariat, leadership by the Communist Party, and guidance by Marxist-Leninist-Maoist Existing Thought" guide all of China's developments. Reform has gone far, but it is restrained at points where modern political forces require adherence to past government policies. For example, individual rights described in the new Constitution, are generally not enforceable against the state.

B. Legislation and Legal Institutions

In 1976, twenty-eight years after its founding, Communist China did not have a civil or criminal code nor a regular law making process. Still, between the time of the revolution and 1978 some fifteen hundred laws were passed, but codification and systemization of the law was regarded as antithetical to Maoist principles. In contrast, since 1978 a detailed revision of existing statutes has been completed, some laws were deleted for lack of correspondence with the most recent Constitution, and many laws were revalidated.⁹⁶ Thus, throughout the period of reform the

93. THE CONST. OF THE P.R.C. preamble, *translated in*, I Statutes and Regulations (University of East Asia Press and Institute of Chinese Law (Publishers) Ltd.) No. 821204, art. 5 (1983).

94. *Id.*

95. See generally SHAO-CHUAN LENG & HUNGDAH CHIU, CRIMINAL JUSTICE IN POST-MAO CHINA: ANALYSIS AND DOCUMENTS 54 (1985); Stanley Lubman, *Western Scholarship on Chinese Law: Past Accomplishments and Present Challenges*, 22 COLUM. J. TRANSNAT'L L. 83, 94-95 (1983).

96. See, e.g., CIVIL PROCEDURE LAW, *supra* note 11; ECONOMIC CONTRACT LAW OF THE P.R.C. [ECONOMIC CONTRACT LAW], *translated in*, I Statutes and Regulations of the People's Republic of China (University of East Asia Press and Institute of Chinese Law (Publishers) Ltd.) No. 811213.1 (1981). FOREIGN ECONOMIC CONTRACT LAW, *translated in*, II Statutes and Regulations of the People's Republic of China (University of East Asia

law making process has become experienced and productive in using regulations to manage an increasingly complex society.

C. Building Legal Institutions

Communist China's legal institutions were created during the 1950's and based on the Soviet model. Development of a formal legal system halted in the late 1950's with the expulsion of the Soviets and the initiation of the Anti-Rightist movement. Rejection of government bureaucracy was Mao's theme in this Anti-Rightist movement; during the more significant Cultural Revolution of the 1960's, this theme led to rejection of the rule-based legal model in favor of Mao's version of mass participation in the law.

In both the Anti-Rightist movement and the Cultural Revolution, representatives of the bureaucracy or of established institutions were forced to leave their positions, moved from their communities, and sometimes sent to forced labor camps. Thousands of jurists, lawyers, and others associated with the legal community were purged. In 1959, the Ministry of Justice - the government bureau supporting the court system and the legal profession - was abolished. Damage to legal institutions was severe.

Rebuilding and extending existing legal institutions has been an important goal of the Reform. In their new emphasis on legality, the leadership has rejected the personal approach to dispute settlement favored during the Cultural Revolution; instead, the legal process functions impersonally by specifying correct judicial and prosecutorial procedures. The courts have been revived and granted a higher status than in recent history. Furthermore, the court system has been restructured, revitalized, and given a new emphasis on professionalism.

The Court System in China has been refined since 1978. Today, there are four levels in the Chinese courts: the People's Court, serving rural areas and urban districts within cities; the intermediate courts, taking appeals from the basic courts and serving as a court of original jurisdiction for more complex cases; the people's high court, functioning as the senior court at the provincial level and taking appeals from the intermediate courts; and lastly the Supreme Court, handling appeals from the high courts.

Judicial selection occurs through election for the President of the Court and by appointment for a higher level People's Congress for the

Press and Institute of Chinese Law (Publishers) Ltd.) No. 850321 (1985) JOINT VENTURE LAW, *translated in*, 1 Statutes and Regulations of the People's Republic of China (University of East Asia Press and Institute of Chinese Law (Publishers) Ltd.) No. 790708 (1979).

CIVIL DISPUTE PROCESSING IN CHINA

other judges. Because judicial training is required, special institutes have been created to educate judges in the applicable law.

New courts have been created to serve necessary functions. The leading example is the new economic courts, functioning at the basic and intermediate court level. These courts specialize in civil and criminal cases that arise under the Economic Contract Law and legislation.

In 1979 the Ministry of Justice, which had been abolished twenty years before, was recreated to manage judicial administration, to aid in the selection and training of judges, and to promote legal education and legal development. In 1985, the Procuracy, which is a combined investigative and prosecutorial office at each level of government, abolished by Mao in the 1970's, was reinstated. Mao had abolished the Procuracy in the 1970's. Finally, in the 1980's, centers for legal research and publication have been developed.

D. Dissemination of Law

Under the socialist model, the law is studied and understood by the masses. Consequently, Mao made extensive group study compulsory. During the reform period, the government established new organizations to disseminate law and utilized newspapers, journals, posters, and television to introduce the law to the people. Community based multiservice law centers, the "legal service stations" are located in village and neighborhood settings. These centers are staffed by one individual trained in law and by several retired cadres. They disseminate the law, and assist in dispute resolution by giving advice or initiating mediation. A staff may also train mediators, act as mediators, or assist with legal education in the community.⁹⁷ The "legal service stations" are located in some twenty-thousand villages across the country.

VI. CONCLUSION

A study of Chinese mediation and civil dispute processing must denote the influence of the government and the Communist Party. The history of complete subjugation of both the People's Mediation system and the Chinese courts by the Communist Party has been documented by

97. See Walter Gellhorn, *China's Quest for Legal Modernity*, 1 J. OF CHINESE L. 1, 9-10 (1987).

observers for over two decades.⁹⁸ The Tiananmen Square dissident trials in 1990 demonstrated that the judiciary and the court system remain directly under the control of the Party, and that statutory pronouncements of civil rights or due process have yet to be realized in practice. This paper has, however, presented the thesis that over the past thirteen years - a period known as the post-Mao Reform period - China has purposefully moved away from direct Party control over the courts and the mediation process. Most contemporary experts on China would support this observation.⁹⁹

Notwithstanding the important special case of the political trials, the decision in the late 1970's to rebuild China's legal institutions, are indicative of the leadership's commitment to the creation of viable legal and mediation systems. For a decade, China has worked to pass a Constitution and code of law. Old law schools were reopened and new law schools were built. The People's Court system was developed and the People's Mediation Committee system was developed and moved into the jurisdiction of the Ministry of Justice. Furthermore, the Chinese people have been committed to participate in international arbitration processes. The gains over the past dozen years have been substantial. The 1991 Chinese dispute processing institutions are now well developed, but they continue to be responsive to the concerns of local Party and government officials.

The People's Mediation Committee system is vast: it involves some four million people as mediators.¹⁰⁰ Originally conceived as a part of the "mass organizations" of communist government, they have become more "secular" institutions. Today, China's mediation system is less focused on ideology and more on its social welfare function.

The mediation committees are best viewed as localized conflict management centers. In urban neighborhoods, rural villages, and factories, mediation committees provide a unique approach to dispute resolution that emphasizes early intervention and personal mediator involvement in relatively minor civil disputes. From their own accounts, mediators and supervising government officials describe the major

98. See generally Phyllis L. Chung, *Deciding Disputes: Factors that Guide Chinese Courts in the Adjudication of Rural Responsibility Contract Disputes*, 52 LAW & CONTEMP. PROBS., Summer 1989 at 101; Jerome A. Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CALIF. L. REV. 1201 (1966); Lubman, *supra* note 12.

99. See generally HARDING, *supra* note 2; Jerome A. Cohen, *The Role of Arbitration in Economic Cooperation with China*, in FOREIGN TRADE, INVESTMENT, AND THE LAW IN THE PEOPLE'S REPUBLIC OF CHINA 508 (Michael J. Moser ed., 2d ed. 1987); Roderick W. Macneil, *Contract in China: Law, Practice and Dispute Resolution*, 38 STAN. L. REV. 303 (1986); William T. O'Hara, *Dispute Resolution in the Union of Soviet Socialist Republics and the People's Republic of China*, R.I.B.J., February 1985, at 4.

100. *Mediation Settles 6.47m Civil Disputes*, CHINA DAILY, August 19, 1986, at 1.

functions of the People's Mediation system as preventing dispute escalation, maintaining social welfare within communities, and helping individual disputants resolve their conflicts.¹⁰¹ The utility of this system, stripped of its ideological dimension, is that it serves as a community based resource for domestic and workplace dispute resolution. Mediation must be assessed as a community welfare function, and it apparently remains an extremely viable large scale system. Its achievements in reducing family violence and neighborhood conflicts must be balanced with the freedom that individual mediators apparently take in justifying their early interventions; they snoop, invade privacy, and serve as a reporting system on the unconventional.

On balance, the People's Mediation Committee system seems to perform an important role in community based dispute management. Disputes involving property, significant sums of money, torts, or other disputes not settled through community mediation are appealed to the People's Courts. The courts, in turn, employ mediation as part of routine judicial practice.

Research in Chinese dispute resolution is limited to government information sources. External researchers do not have independent access to records or direct observation of cases and the decision processes. Among scholars and visitors, there has been little opportunity to interview judges, mediators, and disputants apart from government information personnel. Official reports and descriptions of the People's Mediation program and of the People's Courts are limited to highly favorable data. In these circumstances, independent research is limited in description and analysis.

This paper has described the beginnings of the rationalization of Chinese dispute settlement systems; yet, political control of the judiciary and of the mediation system remains. In the end, the future of dispute settlement in China will be linked with the country's progress in establishing protected civil rights. Until political reform results in the creation of a more independent judiciary and mediation system, based on protected civil rights, one must review China's dispute settlement programs with caution; the potential for abuse of their system is everpresent. Nevertheless, China's approach toward institutionalizing mediation in the People's Mediation system, in the judiciary, and in commercial dispute resolution is unprecedented and can be instructive for our society. More research, with better access, is needed.

101. See *supra* note 29; see also *supra* note 46.

